PITKIN IRON CORP. ET AL.

IBLA 84-6 Decided May 24, 1984

Appeal from a decision of the Colorado State Office, Bureau of Land Management, overruling in part objections to the readjustment of coal lease C-020740.

Vacated and remanded.

1. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

Where a coal lease issued prior to Aug. 4, 1976, the date of enactment of the Federal Coal Leasing Amendments Act of 1976, provides that the United States can readjust its terms and conditions at the end of 20 years, notice of readjustment or notice of intent to readjust must be given to the lessee at or before the expiration of that 20-year period.

2. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

Notice of intent to readjust a Federal coal lease which notice is received by the lessee on Nov. 16, 1978, for a lease whose 20-year readjustment date expired Oct. 1, 1978, is untimely and readjusted terms and conditions may not be imposed pursuant to such notice.

APPEARANCES: Robert Delaney, Esq., Glenwood Springs, Colorado, for Pitkin Iron Corporation; Richard L. Fanyo, Esq., Stephen J. Sullivan, Esq., Denver, Colorado, for Powderhorn Properties Company; Curtis G. Taylor, Esq., Grand Junction, Colorado, for Kermit James and Richard James, Jr.; Marla E. Mansfield, Esq., Department Counsel, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Pitkin Iron Corporation (Pitkin), Powderhorn Properties Company, and Kermit James and Richard James, Jr., have appealed from an August 22, 1983, decision of the Colorado State Office, Bureau of Land Management (BLM), overruling in part objections to proposed readjusted lease terms for coal lease C-020740. The lease was issued on October 1, 1958, and became subject to readjustment at the end of 20 years, October 1, 1978.

On appeal appellants argue that BLM failed to give timely notice of readjustment. Appellants also claim that even if BLM's notice was timely, BLM has no authority to make certain listed changes.

We will first address appellants' arguments concerning the timeliness of the notice. The lease involved in this case provides at section 3(d):

> The lessor reserves the following rights:
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> * * * * * * *
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> (d) Readjustment of terms. -- The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

At the time the lease was issued, section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1958), provided:

> Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods.

Section 7 of the Mineral Leasing Act of 1920 was amended by section 6 of the Federal Coal Leasing Amendments Act (FCLAA) of 1976, 30 U.S.C. § 207(a) (1982), to read in pertinent part as follows: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty-years and at the end of each ten-year period thereafter if the lease is extended."

In this case there is no dispute that BLM gave notice which was received by the lessee; the arguments focus on the timeliness of the notice itself. Three documents are central to this controversy. We will describe each of these.

The first is a form notice dated September 9, 1977, sent to all Federal coal lessees. The notice informed lessees of the diligent development requirements imposed by FCLAA. Enclosed with the notice was a copy of Circular 2417 which included quotations from some of the coal lease regulations effective at that time. In its decision BLM made special mention of one of those quoted regulations. It was 43 CFR 3522.2-1(b) (1977), which stated:

> (b) Coal. All coal leases will be subject to readjustment, at the end of the first 20-year period following the issuance of the lease and at the end of each ten-year period thereafter. Before the expiration of the initial 20-year period or any succeeding 10-year period thereafter, the authorized officer shall if it is feasible, notify the lessee of any proposed readjustment of terms and conditions or that no readjustment will [be] made.

The second document is a letter to Pitkin dated November 15, 1978. This letter notified Pitkin that BLM was "in the process of readjusting the terms and conditions of federal coal lease" C-020740, and it requested certain information.

Third is a BLM decision dated October 15, 1979, entitled "Notice of Readjustment -- Additional Bond Required." The first sentence of the decision states, "Notice is hereby given that we are readjusting the terms of federal coal lease number C-020740."

The position of appellants is simple. They claim that notice of proposed readjustment was not given until the BLM decision dated October 15, 1979. They contend that neither the first nor second document gave notice of readjustment, and even if it could be argued that the second document did, it was untimely. Appellants claim that Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982), and California Portland Cement Co. v. Andrus, 667 F.2d 953 (10th Cir. 1982), require that notice be given on or before the expiration of the lease's 20th year in order to be effective for readjustment purposes. They claim any notice of readjustment given after October 1, 1978, was untimely.

BLM's position and supporting rationale is set forth in its decision as follows:

> As indicated earlier in this decision, both lessees were mailed a copy of notice concerning the diligent development requirements of the FCLAA in September 1977 with an enclosure that contained the December 29, 1976 revision of 43 CFR 3522.2-1, part of which is quoted on the second page of this decision. This enclosure clearly put Pitkin Iron Corporation on notice that the authorized officer of the Bureau was under an obligation, if feasible, to readjust the lease OR to notify the lessee(s) that there would be no readjustment prior to the readjustment date (October 1, 1978). Under these circumstances, considering the lessee's receipt of a clear notice that the Bureau was in the process of readjusting the lease on November 16, 1978, forty-seven [sic] days following the readjustment date, we conclude that the lessee did receive notice of the readjustment process in a timely fashion.

Further analysis of this conclusion follows:

> (a) The first notice concerning readjustment in the case of Rosebud Coal Sales Company, Inc. v. Andrus et al., supra, was apparently issued about two and one-half years after the expiration of the lease's second twenty-year period, 667 F.2d 950, while in California Portland Cement Company v. Andrus et al., supra, the period exceeded two and one-half years (January 4, 1975 to sometime in August 1977), 667 F.2d 954. While the Tenth Circuit in the Rosebud case quoted with some favor the District Court decision indicating that the notice, together with the readjusted terms, should have been made on or prior to the critical anniversary date,

> considering the lengthy delay of 2-1/2 years in such case, we do not find it essential to hold that every specific notice that a lease will be readjusted must be mailed prior to or on the readjustment date so long as the delay thereafter is not unreasonable. It is quite clear that a delay of 2-1/2 years is unreasonable. Where a lessee received notice one year and eleven days prior to the readjustment date that the authorized officer must either readjust the terms or notify the lessee that no readjustment would occur and received further notice that readjustment was underway on the 47th [sic] day following the readjustment date, timely notice of the process was given.
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> (b) In accepting the applicability of the Rosebud and California Portland decisions to future decisions of the Department, the Interior Board of Land Appeals in Kaiser Steel Corp. et al., [63 IBLA 363 (1982)] reversed the attempt to readjust 15 cases where the length of delay from the date the lease became subject to readjustment to the date of the notice that the lease was being readjusted ran from one year, three months and twelve days to thirteen years, two months and eleven days (Calculated from Appendix, 63 IBLA 368). Given the delays involved in the cases in the Kaiser decision, two-thirds of which exceeded five years, the reversal of the Bureau's effort to readjust seems mandatory from a common sense viewpoint. While the decision implies that a firm notice of readjustment must be issued at or prior to the crucial anniversary date, we find in this case that the letter of November 15, 1978 was close enough to October 1, 1978 to be notice of readjustment process "at" the end of the first twenty-year period, when taking into consideration the notice received by Pitkin Corporation on September 19, 1977 that contained the applicable regulation requiring either readjustment or a notice that no readjustment would occur. 1/

(Decision at 8).

BLM also states that the small delay occasioned by employees of the Secretary "cannot be construed as waiving the Secretary's statutory duty to bring the terms of coal lease C-020740 into compliance with the law in effect on October 1, 1978, as soon as practical thereafter" (Decision at 10).

In Kaiser Steel Corp., supra, the Board considered certain coal lease readjustment appeals in light of the decisions in Rosebud Coal Sales Co., supra, and California Portland Cement Co., supra. The Board found, in reliance on those decisions, that "where there was no notice prior to the end of the 20-year period from BLM to the lessee that readjustment of the lease

1/ Although counsel for BLM made an appearance on appeal, no further argument was offered in support of this point. Counsel stated, "Upon review of the BLM's decision, it appears that it adequately explains the timeliness of this readjustment."

terms was contemplated, * * * BLM had no authority to belatedly readjust the terms in these coal leases as the several BLM decisions attempted to do." 2/ Kaiser Steel Corp., supra at 367. Subsequently, the Board stated on a number of occasions that notice of readjustment must be given no later than the expiration of the time for readjustment. Northern Minerals Co., 71 IBLA 129 (1983); Franklin Real Estate Co., 71 IBLA 13 (1983); Sunoco Energy Development Co., 65 IBLA 323 (1982). 3/

[1] The Board has held that where notice of intent to readjust a coal lease is given to a lessee prior to expiration of the 20-year period, such notice satisfies the statutory requirement for readjustment, and BLM may subsequently provide the specific terms or conditions for readjustment. Kaiser Steel Corp., 76 IBLA 387, 391 (1983); Gulf Oil Corp., 73 IBLA 328, 331 (1983); Coastal States Energy Co., 70 IBLA 386, 390 (1983), appeal pending, Coastal States Energy Co. v. Watt, C83-0730J (C.D. Utah June 3, 1983).

In this case neither the first document nor its enclosure constituted notice of readjustment. While the enclosure cited a regulation relating to readjustment, that regulation stated only that the authorized officer "shall," if it is feasible, prior to expiration of the first 20-year period, notify the lessee of any proposed readjustment or that no readjustment will be made. Since the public is presumed to have knowledge of duly promulgated regulations published in the Federal Register, the enclosure, quoting the readjustment regulation, afforded Pitkin no special notice of readjustment of the lease in question. Indeed, even the regulation itself contemplated notice by BLM prior to expiration, if feasible, that either the lease would be readjusted or not.

We next turn to the November 15, 1978, letter to Pitkin. Appellants assert that because the letter did not state whether an actual decision to readjust the lease had been made, it was insufficient to constitute notice. Despite appellants' claim, we find that the letter did, in fact, notify

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2/ The court stated in Rosebud Coal Sales Co. v. Andrus, supra at 951:

"[3] In so considering all the contract provisions, and in an application of the ordinary meaning to the terms, it is not difficult to reach the conclusion that the readjustment was to be when each twenty-year period expired, on that date and not at a later time. The statement of time "at the end of" on its face is not susceptible to any variation as it is a precise time. Furthermore, as mentioned above, it is presented as an option to the Government to make the changes it considers necessary or not to act at all. Since such broad discretion is given, and considering the nature of the mining business, it might be expected that the time to act was precisely fixed and set at infrequent intervals. There is no legislative history to suggest any variation on the ordinary meaning nor to indicate that a fixed time provision was not to be considered of the essence. It was a provision selected by Congress and repeated from time to time."

3/ The Board has also applied the same principle in appeals involving readjustment of potassium leases. Noranda Exploration, Inc., 71 IBLA 9 (1983); Noranda Exploration, Inc., 69 IBLA 317 (1982); International Minerals & Chemical Corp., 69 IBLA 114 (1982).

Pitkin that BLM was in the process of readjusting coal lease C-020740. The letter was notice to the lessee of BLM's intention to readjust the lease. As stated, supra, the Board has previously held that a notice of intent to readjust, given prior to expiration of the 20-year period, satisfies the requirements for readjustment.

[2] The question presented, however, is whether notice given after the expiration of the time for readjustment is sufficient. The expiration date in this case was October 1, 1978. BLM sent the notice on November 15, 1978, and it was received on November 16, 1978, 46 days after the expiration date.

Two findings by BLM in its August 22, 1983, decision reflect its position with regard to the November 15, 1978, notice. First, BLM distinguished the court decisions in Rosebud Coal Sales Co., supra, and California Portland Cement Co., supra, from the present situation. BLM noted the delay in notice of readjustment in those cases (some 2-1/2 years) was "unreasonable," and concluded that delay is acceptable if it is "not unreasonable." It then found that the November 15, 1978, letter was "close enough" to October 1, 1978, to be notice of the readjustment process "at" the end of the first 20-year period, "when taking into consideration the notice received by Pitkin Iron Corporation on September 19, 1977, that contained the applicable regulation requiring either readjustment or a notice that no readjustment would occur" (Decision at 8).

We cannot accept BLM's rationale. We can find no support for adoption of a "close enough" test. In fact, the Department's regulations suggest otherwise. In 1979 the Department published final regulations relating to readjustment of coal lease terms. 44 FR 42635 (July 19, 1979). Those regulations contained the following provision at 43 CFR 3451.1(b) (1979).

> The authorized officer shall notify the lessee whether or not any readjustment of terms and conditions is to be made. If feasible, the authorized officer shall so notify the lessee of any lease which becomes subject to readjustment prior to June 1, 1980, before the expiration of the current 20-year period. 4/

The Department policy at that time concerning readjustment was set forth in the preamble at 44 FR 42601-02 (July 19, 1979), wherein the Department stated:

> Comments received from industry objected to the Department of the Interior's assertion of the authority to readjust leases

4/ These regulations also contained the following provision at 43 CFR 3451.1(c) (1979):

"If the lease became subject to readjustment of terms and conditions before August 4, 1976, but the authorized officer prior to that date neither readjusted the terms and conditions nor informed the lessee whether or not a readjustment would be made, the terms and conditions of that lease shall be readjusted to conform to the requirements of the Federal Coal Leasing Amendments Act of 1976, and to conform expressly to the provisions for diligent development continued operation in § 3475.6 of this title."

> when the lessee was not so notified at the 20-year anniversary date * * *. The Secretary of the Interior, acting through the Board of Land Appeals, has reaffirmed the Bureau of Land Management's authority to make such readjustments, California Portland Cement Co., 40 IBLA 339 (May 10, 1979), [reversed, California Portland Cement Co. v. Andrus, supra,] and it is the Department's policy to proceed with these readjustments.
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> Several industry comments also objected to section 3451.1(b), which is consistent with the readjustment policy discussed above, and applies to leases with anniversary dates between August 4, 1976, and June 1, 1980. As evidence by section 3451.1(d), the Department of the Interior is meeting the concern behind the industry objections by providing that beginning with June 1, 1980, failure to notify the lessee of readjustment prior to the readjustment anniversary date will constitute a waiver of the right to readjust. 5/ In turn, this provision was roundly criticized by public interest groups in their comments because they regarded it as an abrogation of authority. The Department's position is that while it is wholly lawful to readjust existing leases that were not readjusted on, or where notification of readjustment did not occur before, their anniversary dates, the Department will, beginning with June 1, 1980, assure timely and competent administration of leases by self-imposition of the sanction of waiver. This will guarantee accountability, and will prevent any future situation like that which prevailed with respect to lease readjustments during the early 1970's. On such leases, the notice whether the lease will be readjusted or not will be sent prior to the readjustment anniversary date, or the opportunity to readjust will be lost.

Thus, the Department believed it had authority to readjust leases even when the lessees were not notified at the 20-year anniversary date. It indicated this policy would be applied to leases with anniversary dates between August 4, 1976, and June 1, 1980.

However, it adopted a different policy for leases with anniversary dates after June 1, 1980. For those, the Department determined that failure to notify the lessee prior to the readjustment anniversary date would constitute a waiver of the right to readjust.

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5/ That regulation, 43 CFR 3451.1(d)(1) (1979), provided:

"(d)(1) The authorized officer shall, prior to the expiration of the current or initial 20-year period or any succeeding 10-year period thereafter, notify the lessee of any lease which becomes subject to readjustment after June 1, 1980, whether any readjustment of terms and conditions will be made prior to the expiration of the initial 20-year period or any succeeding 10-year period thereafter. On such a lease the failure to so notify the lessee shall mean that the United States is waiving its right to readjust the lease for the readjustment period in question."

After the issuance of the decisions in Rosebud Coal Sales, Co., supra, and California Portland Cement Co., supra, the Department issued final rulemaking concerning coal lease readjustment. 47 FR 33146 (July 30, 1982). The preamble to that rulemaking provided:

> The recent decision of the Tenth Circuit Court of Appeals in the Rosebud Coal Sales Co. v. Andrus (No. 80-1842, Jan. 8, 1982) case is currently being reviewed in the Bureau of Land Management. The United States has decided not to appeal the decision. The court's decision was rendered after publication of the proposed rulemaking. The language of [new] § 3451.1(b) has been amended in the final rulemaking to reflect the court's decision that Federal coal leases may not be readjusted unless actual notice is given of the readjustment, or of the intent to readjust, prior to the twenty-year anniversary date of the lease.

The rulemaking deleted 43 CFR 3451.1(b) (1981) and amended 43 CFR 3451.1(c) (1981) (renumbered 43 CFR 3451.1(b)) (see note 4 supra) to read:

> If the lease became subject to readjustment of terms and conditions before August 4, 1976, but the authorized officer prior to that date neither readjusted the terms and conditions nor informed the lessee whether or not a readjustment would be made, the terms and conditions of that lease shall not be readjusted retroactively to conform to the requirements of the Federal Coal Leasing Amendments Act of 1976 * * *.

With the 1982 changes, the regulations covered leases which became subject t to readjustment before August 4, 1976 (43 CFR 3451.1(b) (1982)) and those leases subject to readjustment after June 1, 1980 (43 CFR 3451.1(c)(1) (1982)). 6/ The regulation applicable to leases with readjustment dates between August 4, 1976, and June 1, 1980, was deleted. Thus, the regulations did not specifically address the lease in this case which had a readjustment date of October 1, 1978. However, in 1982, the action related above had taken place regarding this lease. It is clear from the preamble language which accompanied the 1982 regulation changes that the Department intended to bind itself to the court's construction "that Federal coal leases may not be readjusted unless actual notice is given of the readjustment, or of the intent to readjustment, prior to the twenty-year anniversary date of the lease." 47 FR 33129 (July 30, 1982).

Although this declaration by the Department was made in connection with the regulation change relating to leases becoming subject to readjustment after June 1, 1980, there appears to be no rationale for distinguishing between leases with readjustment dates between August 4, 1976, and June 1, 1980, and those subject to readjustment after June 1, 1980. The same rules should apply, viz., notice of readjustment or notice of intent to readjust

6/ This regulation is the same as that set forth in note 5, supra. The 1982 rulemaking merely renumbered this regulation as 43 CFR 3451.1(c)(1). 47 FR 33146 (July 30, 1982).

must be given no later than the readjustment anniversary date for the lease. 7/ Neither the statute, the regulations, nor the court decisions support the adoption of the "close enough" test urged by BLM. 8/

One other basis for BLM's conclusion on the timeliness issue is set forth in the BLM decision. BLM stated that unlike the leases involved in the court decisions, the lease in this case became subject to readjustment after the passage of FCLAA. BLM further stated that "[a]t the time C-020740 became subject to readjustment, FCLAA was the law and the Secretary was compelled to readjust the lease to bring it into conformance with FLCAA" (Decision at 9). 9/ BLM concluded:

> The small delay, if any, by employees of the Secretary in this case in notifying the lessee cannot be construed as waiving the Secretary's statutory duty to bring the terms of coal lease C-020740 into compliance with the law in effect on October 1, 1978 as soon as practical thereafter. [Emphasis deleted.]

(Decision at 10).

We cannot accept this rationale in the face of the present regulations. Those regulations provide that for leases which become subject to readjustment after June 1, 1980, the failure to notify prior to the expiration of the period for readjustment shall constitute a waiver of the right to readjust for the period in question. Thus, by regulation, the Department has provided that for certain leases that become subject to readjustment after FCLAA, the United States waives its right to readjust for the period in question when it fails to give timely notice. 43 CFR 3451.1(c)(1). We fail to comprehend how BLM's assertion in its decision that the Secretary has a statutory duty to readjust, which cannot be waived by the "small delay" in the present case, can be reconciled with the regulation which provides for a waiver where notice is not given prior to expiration of the period for readjustment. If the Secretary may waive the right to readjust for leases subject to readjustment after

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7/ The regulations in effect at the time notice of readjustment was given in this case stated that notice should be given before the anniversary date, if feasible. There is nothing in the record in this case to indicate that notification of readjustment was not feasible on or prior to Oct. 1, 1978.

8/ Since we found that the first document provided no notice of readjustment or intent to readjust the lease in question, it could lend no viability to the "close enough" test, as asserted by BLM.

9/ BLM indicated that it was aware that some of the leases involved in Kaiser Steel Corp., 63 IBLA 363 (1982), where we held readjustment had to be made at or before expiration of the readjustment period, were subject to readjustment after Aug. 4, 1976. BLM attempted to distinguish Kaiser on the basis that the issue of the Secretary's duty to readjust was not raised in that case. We note also that the lease (C-012894) involved in Franklin Real Estate Co., supra, was subject to readjustment after Aug. 4, 1976. We found that failure to provide notice of readjustment or notice of intent to readjust prior to the expiration of the readjustment period (Dec. 1, 1976) precluded readjustment for the period in question. Id. at 14.

June 1, 1980, we find that the Secretary may also waive that right for the lease in question which was subject to readjustment on or prior to October 1, 1978. Waiver of such a right, however, relates only to the readjustment period in question. Therefore, while the Secretary may readjust the lease terms, he must wait for the next readjustment period.

We find that BLM's notice of readjustment in this case came after the end of the period for readjustment, and that the court decisions in Rosebud Coal Sales Co., supra, and California Portland Cement Co., supra, dictate that such notice was untimely. For the reasons stated above, we conclude that BLM had no authority to readjust the terms of this coal lease at the expiration of the period for readjustment because no notice was given by BLM to the lessee on or prior to October 1, 1978, that BLM intended to readjust the terms of the lease. This conclusion precludes the necessity to address appellants' specific objections to the proposed lease terms.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded for action consistent with this decision.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Edward W. Stuebing
Administrative Judge